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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-283

GEORGE E. MAHIN, AS DIRECTOR OF REVENUE OF THE STATE OF ILLINOIS,

Petitioner,

vs.

TERRANCE R. MITCHELL, ASALEE LABORN, ERNEST J. NASSOS, JOHN A. PETERSON AND FREDERICK W. WENDNAGEL,

Respondents.

SUPPLEMENTAL BRIEF FILED PURSUANT TO RULE 24(5) IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

George E. Mahin, as Director of Revenue of the State of Illinois (petitioner) respectfully files this supplemental brief to his petition for writ of certiorari for the purpose of calling to this Court's attention certain new matter, pursuant to Rule 24(5).

The Connecticut Cases.

Since petitioner's petition was prepared, two extremely important decisions of the Connecticut Supreme Court have been published, both of which add substantial support to petitioner's contention that the holding of the Illinois Supreme Court in this case is utterly lacking in fair or sub-

stantial support, and was based upon a misapprehension of the applicable federal constitutional law.

Kellems v. *Brown, Tax Commissioner* and *Peterson* v. *Sullivan, Tax Commissioner* do not yet appear in the official Connecticut Reports nor in the Atlantic Second Reports, but they do appear in 34 Connecticut Law Journal No. 6. For the convenience of the Court, these opinions are printed in full in the Appendix to this supplemental brief. At least one of these cases (*Kellems*) will be appealed to this Court.

Kellems v. *Brown* presented numerous questions concerning the Connecticut Capital Gains and Dividends Tax, enacted in the June, 1971, special session of the Connecticut General Assembly. Only one of these is of importance here. Section 12-506 of that Act imposes a tax at the rate of 6% on all "gains from the sale or exchange of capital assets occurring after December 31, 1970, which have been earned, received in fact or constructively, accrued or credited to the taxpayer during his taxable year." Further, section 55-3 of the Connecticut General Statutes provides:

> No provision of the general statutes, not previously contained in the statutes of the state, which imposes any new obligation on any person or corporation, shall be construed to have a retrospective effect.

Like the Illinois Income Tax Act, the Connecticut statute defines terms by specific reference to the federal tax law but contains no express provision requiring the use of federal basis for determining gain or loss.

The taxpayers in the *Kellems* case made three arguments, as stated by the Connecticut Supreme Court:

> • • • First, they maintain that § 12-506 of the General Statutes should, as a matter of statutory construction, be interpreted not to adopt the federal basis for the taxation of capital gains but to tax, when realized, only accretions in value after December 31, 1970. Second, they argue that § 55-3 of the General Statutes requires that § 12-506 be construed to allow the taxpayer to use instead of the federal basis for computing capital gains

the fair market value of the asset on December 31, 1970. Finally, they contend that if the statute is construed as adopting the federal basis for the computation of capital gain that such a construction would render the statute impermissibly retroactive under the United States and Connecticut constitutions (34 Conn. L. J. No. 6, pp. 9-10)

Although the taxpayers' arguments with respect to construction are those which the Illinois court adopted in this case, the Connecticut Supreme Court had no difficulty in rejecting them as non-meritorious, pointing out:

• • • "When two constructions are possible, courts will adopt the one which makes the statute effective and workable, and not the one which leads to difficult and possibly bizarre results." • • •

From a close examination of the entire act, it is obvious that the legislature intended to incorporate and adopt the federal basis for computation of capital gains and loss. Section 12-505 specifically states: "Gains from the sale or exchange of capital assets means net gains as defined for federal income tax purposes." While there is some ambiguity in the meaning of "net gains" (a problem which we will discuss later in this opinion), we believe that **the reference to the federal income tax structure is of controlling significance and decisive on the question of what basis is to be used in computing the tax on gains from the sale or exchange of capital assets.**

• • • • •

We find no indication either in the language of the act itself or in its legislative history that the General Assembly intended to adopt any other standard for taxing capital gain than that employed for federal tax purposes to which standard the act makes specific reference. Only gains realized after December 31, 1970, are taxed under the act. **The fact that the amount of tax depends, among other things, on the cost of the asset which may have been acquired prior to the enactment of the tax does not make the tax retrospective. The tax being imposed at the time of realization of the gain operates only in a prospective manner and, accord-**

ingly, does not operate counter to the proscription of § 55-3 of the General Statutes. (34 Conn. L. J. No. 6, pp. 10-11; emphasis supplied)

This language of the Connecticut Supreme Court is virtually identical with that in the dissenting opinion of Justices Davis and Schaefer in the instant case:

> * * * Section 102 of the Act states: "Except as otherwise expressly provided or clearly appearing from the context, any term used in this Act shall have the same meaning as when used in a comparable context in the United States Internal Revenue Code of 1954 * * *." (Ill. Rev. Stat. 1971, ch. 120, par. 1-102.) Section 201(a) states that the tax imposed is to be measured by "net income". Section 202 thereafter defines "net income": "* * * a taxpayer's net income for a taxable year shall be that portion of his base income for such year which is allocable to this State * * *." Section 203 then defines "base income" to mean "adjusted gross income for the taxable year" in the case of individuals, and "taxable income for the taxable year" in the cases of corporations, trusts and estates. Section 203(d)(1) then provides that: "* * * a taxpayer's gross income, adjusted gross income, or taxable income for a taxable year shall mean the amount of gross income, adjusted gross income or taxable income **properly reportable for federal income tax purposes** for the taxable year under the provisions of the Internal Revenue Code.
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> * * * * *
>
> *** * * It seems apparent that the taxpayer's base income was meant to be his adjusted gross or taxable income for Federal taxation purposes except as specifically modified in section 203 of our Act. This section did not contain the specific modification imposing the August 1, 1969 valuation limitation date read into the Act by the court in Thorpe.** (51 Ill. 2d at 465-466; 283 N. E. 2d at 472; emphasis supplied)

Contrast the Connecticut court's opinion with the reasoning in *Thorpe:*

• • • For the reasons hereafter given, we consider the legislative intent to be that, in the computation of capital gains and losses, the value of property acquired prior to August 1, 1969, shall, for the purpose of computation of gains or losses be limited by its value determined as of August 1, 1969.

First, we have the familiar rule that statutes will not be construed *retroactively* unless it clearly appears such was the legislative intention. • • • The Act is clear, indeed it expressly provides, that the tax shall operate prospectively beginning August 1, 1969. The Act does not state, however, whether the basis for determining gain or loss from the sale or exchange of a capital asset purchased or acquired prior to August 1, 1969, should be its August 1, 1969, value or its date of acquisition value. The terms of the Code are, of course, incorporated by reference; but **it is most unusual that the tax would be made prospective by such specific language and the basis date for computing gain on the sale or exchange of property should be made retroactive by such nonspecific language**, particularly when the rule of statutory construction is that statutes will not be construed retroactively unless it clearly appears such was the legislative intent.

Second, we have the equally familiar rule that "It is our duty so to interpret the statute as to promote its essential purposes and to avoid, if possible, a construction that would raise doubts as to its validity." • • • **It is questionable that the General Assembly, by the nonspecific language which it employed, intended to adopt the basis dates from the Internal Revenue Code when such dates under our newly enacted Income Tax Act would raise doubts as to its validity.** (43 Ill. 2d at 50-52, 250 N. E. 2d at 640-641; emphasis supplied)

Where the Connecticut court found "specific reference" to "the federal income tax structure" to be "of controlling significance and decisive on the question of what basis is to be used in the computing the tax on gains from the sale or exchange of capital assets," the Illinois court found in-

corporation by reference of the terms of the Internal Revenue Code to be "nonspecific language" insufficient to incorporate the federal basis rules. As stated by Justice Davis in his dissenting opinion:

> • • • The finding in *Thorpe* that the legislature intended an August 1, 1969, valuation date for the computation of capital gains and losses can have **no basis other than the misapprehension that without such a finding the tax would have been retroactive and, perhaps, unconstitutional.** (51 Ill. 2d at 459; 283 N. E. 2d at 468; emphasis supplied)

The *Thorpe* court's misconception as to "retroactivity" lies at the heart of its decision as to legislative intent. This question was *not* presented to the court in *Thorpe,* and the refusal of the Illinois Supreme Court in the instant case to consider it constitutes a critical failure to come to grips with the fundamental constitutional question. On this issue, the Connecticut court, like the courts of many other states which have been willing to face it, concluded that:

> A tax on realized capital gain does not operate in a retroactive manner merely because ascertainment of the amount of the gain is measured by the difference between the sale price received during the tax year and the taxpayer's basis which may have been established at some earlier time. (34 Conn. L. J. No. 6, p. 11)

The Connecticut court noted that the *Thorpe* case "appears to have reached a contrary conclusion," but chose not to emphasize its disagreement with the Illinois court, saying merely that that decision "was based primarily on the court's interpretation of the Illinois statute • • • which expressly provided that the tax should operate prospectively beginning August 1, 1969." Actually, the holding in the *Kellems* case is in direct conflict with *Thorpe* and with the instant case, since the Connecticut statute (§ 55-3) also expressly requires that the new capital gains tax operate prospectively only.

Petitioner has been advised by counsel for the plaintiff in the *Kellems* case that an appeal to this Court will be taken under 28 U. S. C. § 1257(2). This Court will, therefore, have an opportunity to rule definitively upon the constitutionality of taxation of gains accrued but not realized prior to enactment of a state income tax statute. Petitioner believes that this Court will find such taxation constitutional. Assuming that this proves to be the case, to permit the decision of the Illinois Supreme Court to stand without review would be to deprive the State of Illinois of vitally needed revenue by virtue of a decision rooted in a misconception of applicable constitutional principles. There is no fair or substantial support for the stated nonfederal ground of decision in this case; the decision was impelled either by the Illinois Supreme Court's erroneous belief that the United States Constitution requires an effective date valuation limitation, or by its attempt to evade consideration of this federal constitutional issue. In either event, this Court has jurisdiction to review and reverse, or, at the least, remand this case.

The Missouri Statute.

Act 175, enacted by the 76th General Assembly of Missouri and approved on June 23, 1972, with an effective date of January 1, 1973, appears in Vernon's Missouri Legislative Service No. 3. This Act enacts an entirely new Missouri income tax tied to the federal statutes, and repeals the previous "start-from-scratch" Missouri tax. Section 143.091 of the new Act provides that "Any term used in this act shall have the same meaning as when used in a comparable context in the laws of the United States relating to income taxes, unless a different meaning is clearly required by the provisions of this act," but, like the Illinois Income Tax Act, it contains no express reference to the use of federal basis for determining gain or loss. Also like the

Illinois Income Tax Act and the Connecticut Capital Gains and Dividends Tax Act, the new Missouri statute contains no express effective date valuation limitation. The only adjustment provided for appears in section 143.121 which provides that in determining Missouri adjusted gross income, there shall be deducted from federal adjusted gross income:

> The portion of any gain, from the sale or other disposition of property having a higher adjusted basis to the taxpayer for Missouri income tax purposes than for federal income tax purposes on December 31, 1972, that does not exceed such difference in basis. If a gain is considered a long-term capital gain for federal income tax purposes, the modification shall be limited to one-half of such portion of the gain.

Inasmuch as the only property which could have a higher adjusted basis for Missouri income tax purposes than for federal income tax purposes would be property acquired before January 1, 1917, as to which section 143.190 of the present Missouri income tax act provides a special basis, it is clear that the new Missouri income tax contains no prohibition against the taxation of gains accruing prior to its enactment. The holding of the Illinois Supreme Court in the instant case, as in *Thorpe,* flies in the face of the legislative history of the Illinois statute, the wording of the statute itself, which corresponds with that of Connecticut and Missouri as well as many other states, and numerous decisions of this Court and of the highest state courts. It is

without support; it introduces an element of unwarranted confusion into an area of law where uniformity is of the utmost desirability; it should be reviewed and reversed.

Respectfully submitted,

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APPENDIX.

SUPREME COURT
June Term, 1972

VIVIEN KELLEMS ET AL. v. F. GEORGE BROWN, TAX COMMISSIONER, ET AL.

Action for a declaratory judgment concerning the construction and the constitutionality of a statute imposing a tax on dividends and capital gains, brought to the Superior Court in Hartford County and reserved by the court, *Rubinow, J.*, for the advice of this court.

John S. Murtha, with whom were *John E. Silliman* and *Willard F. Pinney, Jr.*, and, on the brief, *J. Read Murphy*, for the plaintiffs.

Ralph G. Murphy, assistant attorney general, with whom were *John M. Dunham* and *Richard K. Greenberg*, assistant attorneys general, and, on the brief, *Robert K. Killian*, attorney general, for the defendants.

HOUSE, C. J. This case started out as an action for a declaratory judgment and for ancillary relief by way of an injunction. The action was obviously designed primarily to seek a determination of the constitutionality of chapter 224 of the General Statutes, commonly known as the Capital Gains and Dividends Tax. This chapter was enacted as Public Act No. 8 of the June, 1971, special session of the General Assembly. The procedure finally followed by the parties, however, deviated from the usual practice of a direct stipulation as to the operative facts with a prayer for relief stating "with precision the declaratory judgment

desired." Practice Book § 310(b). Instead, following the practice customarily followed in will construction suits, the parties stipulated for a reservation of the case to this court on an agreed statement of facts, propounding twenty questions on which the advice of the court was sought. See Practice Book §§ 738, 739, Form 614, p. 759. Two questions (Nos. 2 and 4) were not pursued in this court and one (No. 5) has become moot. The remaining questions are set out in the footnote.[1]

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1. "1. Do the provisions of Chapter 224 imposing a tax on dividends received by individual residents of the State of Connecticut and leaving untaxed other items of unearned income received by said individuals violate the equal protection provisions of (a) Article First, Section 20 of the Connecticut Constitution? (b) Section 1 of the 14th Amendment to the United States Constitution (hereinafter 14th Amendment)?

• • • • •

"3. Do the provisions of Section 12-506(c)(3) which grant an exemption to any person who is unmarried and a widow on the last day of her taxable year, which is two and one-half times greater than the same exemption granted to a person who is not such a widow, violate the equal protection provisions of (a) Article First, Section 1 of the Connecticut Constitution? (b) Article First, Section 20 of the Connecticut Constitution? (c) Section 1 of the 14th Amendment?

• • • • •

"6. Are any of the Sections of Chapter 224 void for vagueness under the due process clause of (a) Article First, Section 8 of the Connecticut Constitution? (b) Section 1 of the 14th Amendment?

"7. As to each of the following sections of the Chapter is there an unlawful delegation of legislative power to an administrative official in violation of Article First, Section 8, Article Second and Article Third, Section 1 of the Connecticut Constitution (a) Section 12-508? (b) Section 12-510? (c) Section 12-516? (d) Section 12-517? (e) Section 12-518?

"8. As to each of the following sections of the Chapter is there an unlawful delegation of legislative power from the Connecticut General Assembly to the Congress of the United States in violation of any of Article First, Section 8, Article Second and Article Third, Section 1 of the Connecticut Constitution (a) Section 12-505? (b) Section 12-506? (c) Section 12-506a?

"9. As to each of following sections of the Chapter is there an unlawful delegation of legislative power from the Connecticut

Perhaps because of this unorthodox procedure many of the questions reserved for the advice of this court lack the precision and specificity which is not only desirable but

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General Assembly to the Congress of the United States in violation of the 10th Amendment to the United States Constitution (a) Section 12-505? (b) Section 12-506? (c) Section 12-506a?

"10. Does Section 12-505 of the Chapter define 'net gains' in such a manner as to interfere retroactively and unlawfully with vested rights in violation of the due process provisions of (a) Article First, Section 8 of the Connecticut Constitution? (b) Section 1 of the 14th Amendment?

"11. Do Sections 12-521 and 12-522, read in conjunction with Section 12-515, provide an adequate procedural relief in compliance with the due process provisions of (a) Article First, Section 8 of the Connecticut Constitution? (b) Section 1 of said 14th Amendment?

"12. Is the plaintiff Kellems obligated by law to pay the tax imposed by Chapter 224 upon dividends as defined by Section 12-505 which she has received during calendar year 1971?

"13. Is the plaintiff Miller obligated by law to pay the tax imposed by Chapter 224 upon dividends, as defined by Section 12-505, which dividends he has received during calendar year 1971?

"14. Is the plaintiff Marsh obligated by law to pay the tax imposed by Chapter 224 upon his gains from the sale of capital assets as defined by Section 12-505, which gains he has realized during calendar year 1971?

"15. If the answer to the preceding question is 'Yes,' is the plaintiff Marsh entitled to compute such gains within the meaning of Sections 12-505 and 12-506 using as his basis the value of his securities (a) on December 31, 1970? (b) on August 15, 1971?

"16. If neither of the dates in question 15 is applicable, must the plaintiff Marsh compute such gains within the meaning of Sections 12-505 and 12-506 using as his basis the value of his securities on the date of his acquisition, February 28, 1968?

"17. If the answer to question 14 is 'Yes,' must the plaintiff Marsh compute such tax at 6% of 100% of his net capital gains realized by him during calendar year 1971?

"18. If the answer to question 17 is 'No,' does the plaintiff Marsh compute such tax at 6% of 50% of such net capital gains?

"19. Is the plaintiff Marsh entitled to an exemption under the provisions of Section 12-506(c)(1) which is more than $2000?

"20. If the answer to question 13 is 'Yes,' may the plaintiff Miller deduct from his dividend income his capital losses realized in 1971?"

also mandatory in a declaratory judgment action. Practice Book § 310(b). See *Plunkett* v. *Nationwide Mutual Ins. Co.*, 150 Conn. 203, 211, 187 A. 2d 754; *Holt* v. *Wissinger*, 145 Conn. 106, 109, 139 A. 2d 353; *Kievman* v. *Grevers*, 122 Conn. 406, 412, 189 A. 609. More particularly, many of the questions reserved are not limited to the situation of the particular plaintiffs as disclosed in the stipulation of facts or to the impact of the statutory provisions on any right of these plaintiffs as distinguished from the rights of any person not a party to this action. "[A] plaintiff, in challenging the constitutionality of a statute, must sustain the burden of proving that the effect or impact of the challenged statute on him adversely affects a constitutionally protected right which he has. 'This means a right which he proves that he has under the facts of his particular case and not merely under some possible or hypothetical set of facts not proven to exist.' *Hardware Mutual Casualty Co.* v. *Premo*, . . .[153 Conn. 465, 471, 217 A. 2d 698]." *Adams* v. *Rubinow*, 157 Conn. 150, 152, 251 A. 2d 49; *Riley* v. *Liquor Control Commission*, 153 Conn. 242, 215 A. 2d 402; *Karen* v. *East Haddam*, 146 Conn. 720, 727, 155 A. 2d 921. A number of the plaintiffs' questions are not susceptible of the dogmatic and categorical answers which the plaintiffs seek. Under the circumstances, it is only because of the importance of the issues involved and the great public interest in them that we undertake, so far as is reasonably possible, to include in our discussion answers to some of the broad questions propounded. We do so with the express caveat that such answers are applicable only within the limited context of the specific facts covered by the stipulation agreed on by the parties to this action.

Chapter 224, to which we will hereafter refer as the act, is too long to be incorporated in this opinion and may be found in the 1971 Public Acts and General Statutes §§ 12-505—12-522. In essence, the act levies an income tax

on dividends received and capital gains realized by residents of Connecticut.[2] It is unnecessary to summarize in any detail the facts as stipulated by the parties. It suffices to note that the defendant F. George Brown is the state tax commissioner, that the plaintiffs Vivien Kellems, Carl E. Miller and Bryan H. Marsh are all residents of Connecticut, that during 1971 Kellems and Miller received dividends as that term is defined in the federal Internal Revenue Code, and that during 1971 Marsh received net gains from the sale or exchange of capital assets as those terms are defined in chapter 224.

As briefed by the parties, the case reserved for the advice of this court involves five principal issues, four of them involving the constitutionality of the act and the fifth primarily questions of statutory construction. The plaintiffs claim that (1) chapter 224 violates the equal protection provisions of the state and federal constitutions in singling out for taxation dividends received by individuals while not taxing interest income and other types of investment income; that (2) the act is so badly drafted as to be void for vagueness under the due process clauses of the state and federal constitutions; that (3) the act unlawfully delegates legislative powers to the state tax commissioner and the federal government in violation of applicable constitutional principles; that (4) if the basis for measuring capital gains is not limited to the increase in value subsequent to December 31, 1970, then the capital gains tax violates the due process provisions of the state and federal constitutions; and that (5) even if the act is otherwise valid, a proper construction of its provisions requires that the taxpayer be permitted a deduction of 50 percent of his net long term capital gains less net short term capital losses.

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2. For a general discussion of the 1971 act, see Lester B. Snyder, "Tax Policy in the 1971 Connecticut General Assembly," 46 Conn. B. J. 136 (1972) and Frank S. Berall, "Connecticut's Investment Income Tax," id., p. 185.

I.

(a) We consider first the contention of the plaintiffs that the act is unconstitutional because it establishes arbitrary and unreasonable classifications in the designation of the subject of the tax and in the added exemption allowed to "any person who is unmarried and a widow on the last day of her taxable year." § 12-506(c)(3). It is the plaintiffs' claim that the classifications designated by the act violate the equal protection clauses of the fourteenth amendment to the constitution of the United States, § 1, and the constitution of Connecticut, article first, § 20. The Connecticut constitutional provision has "a like meaning to that in the fourteenth amendment to the constitution of the United States which prohibits the states from denying to any person the equal protection of the laws." *Lyman* v. *Adorno*, 133 Conn. 511, 515, 52 A. 2d 702; *State ex rel. Brush* v. *Sixth Taxing District*, 104 Conn. 192, 195, 132 A. 561. The plaintiffs assert that these constitutional provisions are violated by the imposition of the tax on investment income derived from dividends and capital gains while investment income in the form of interest and rents is not subject to the tax. Similarly, they contest the constitutional validity of the provision of the act which grants to "any person who is unmarried and a widow" a tax exemption which is two and one-half times greater than the exemption granted to other taxpayers including widowers, divorced women and women who have never married.

It is well settled that a plaintiff who attacks a statute on constitutional grounds has no easy burden. As this court said in *Adams* v. *Rubinow*, 157 Conn. 150, 152-53, 251 A. 2d 49: "Because of the separation of powers, one claiming that a legislative enactment is invalid on the ground that it is unconstitutional must establish its invalidity on that ground beyond a reasonable doubt. *Hardware Mutual Casualty Co.* v. *Premo*, 153 Conn. 465, 470, 217 A. 2d 698.

. . . [W]here a statute reasonably admits of two constructions, one valid and the other invalid on the ground of unconstitutionality, courts should adopt the construction which will uphold the statute even though that construction may not be the obvious one. *Carilli* v. *Pension Commission*, 154 Conn. 1, 8, 220 A. 2d 439; *Ferguson* v. *Stamford*, 60 Conn. 432, 447, 22 A. 782; *Wilton* v. *Weston*, 48 Conn. 325, 338. Of course, the fact that the plaintiffs chose to request a declaratory judgment, upon a stipulation of facts, in nowise changes or relieves them of the burden of proof resting on them. *Hardware Mutual Casualty Co.* v. *Premo*, *supra*, 472, 473." To like effect we said in *Edwards* v. *Hartford*, 145 Conn. 141, 145, 139 A. 2d 599: "Courts in passing upon the validity of a legislative act do not feel justified in declaring it void unless there is a clear and unequivocal breach of the constitution. . . . We approach the question with great caution, examine it with infinite care, make every presumption and intendment in favor of validity, and sustain the act unless its invalidity is, in our judgment, beyond a reasonable doubt."

In Connecticut, the power to levy taxes is vested in the General Assembly. *Beach* v. *Bradstreet*, 85 Conn. 344, 348, 82 A. 1030. Unlike the federal constitutional limitation which existed prior to adoption of the sixteenth amendment, it appears that this state's power of taxation has never been constitutionally limited except by the constitutional requirements of equal protection and due process. See *Montgomery* v. *Branford*, 107 Conn. 697, 707-8, 142 A. 574. In selecting the subjects of taxation, legislatures have been allowed broad discretion. "The latitude of discretion is notably wide in the classification of property for the purposes of taxation and granting of partial or total exemptions upon grounds of policy." *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415, 40 S. Ct. 560, 64 L. Ed. 989. As the United States Supreme Court observed in *Madden* v. *Kentucky*, 309 U. S. 83, 87-88, 60 S. Ct. 406, 84 L. Ed.

590: "The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. This Court fifty years ago concluded that 'the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation,' and the passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."

In *State* v. *Murphy*, 90 Conn. 662, 666, 98 A. 343, this court similarly stated: "The taxing power is an inherent attribute of sovereignty and as such unlimited in character and scope save as limitations may be self-imposed. Under our form of government its exercise is vested in the legislative department which may exercise it for lawful purposes in its discretion both as regards the choice of the subject-matter of taxation and the extent and manner of the tax, save as constitutional limitations may intervene, and in the case of the States save also as the property and agencies of the national government within their borders are not within the reach of their sovereignty. *M'Culloch* v. *Maryland*, 17 U. S. (4 Wheat.) 316, 428; *Nathan* v. *Louisiana*, 49 U. S. (8 How.) 73, 82; *Ward* v. *Maryland*, 79 U. S. (12 Wall.) 418, 426; *North Missouri R. Co.* v. *Maguire*, 87 U. S.

(20 Wall.) 46, 62. In the choice of subject-matter there is no restriction, not constitutional, short of one imposed by lack of jurisdiction. 'Whether it be person or property, or possession, franchise or privilege, or occupation or right,' the legislative power extends to it. 'It reaches to every trade or occupation; to every object of industry, use or enjoyment,' in fact to every subject over which the sovereignty of the State extends, and is co-extensive with that sovereignty. 1 Cooley on Taxation (3d Ed.) 9; Cooley's Constitutional Limitations (7th Ed.) 678; *M'Culloch* v. *Maryland*, 17 U. S. (4 Wheat.) 316, 429; *Providence Bank* v. *Billings*, 29 U. S. (4 Pet.) 514, 563; *Ward* v. *Maryland*, 79 U. S. (12 Wall.) 418, 426; *North Missouri R. Co.* v. *Maguire*, 87 U. S. (20 Wall.) 46, 62."

More recently, in *Allied Stores of Ohio, Inc.* v. *Bowers*, 358 U. S. 522, 526, 527, 79 S. Ct. 437, 3 L. Ed. 2d 480, the United States Supreme Court thus stated the guiding principles: "Of course, the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron clad rule of equality, prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation. . . . 'To hold otherwise would be to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to assure. *Ohio Oil Co.* v. *Conway*, . . .[281 U. S. 146, 159, 50 S. Ct. 310, 74 L. Ed. 775] . . . . 'If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law. *Brown-Forman Co.* v. *Kentucky*, 217 U. S. 563, 573 [30 S. Ct. 578, 54 L. Ed. 883]' . . . it has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth

Amendment if any state of facts reasonably can be conceived that would sustain it. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78 [31 S. Ct. 337, 55 L. Ed. 369]; *Quong Wing* v. *Kirkendall*, 223 U. S. 59 [32 S. Ct. 192, 56 L. Ed. 350]; *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357 [36 S. Ct. 370, 60 L. Ed. 679]; *State Board of Tax Comm'rs* v. *Jackson*, 283 U. S. . . .[527, 537, 51 S. Ct. 540, 75 L. Ed. 1248]."

This court has also used similar language in describing permissible classification. "The legislature has a wide discretion in the classification of property for taxation and in granting exemptions. . . . The classification must be reasonable and not arbitrary and must be based upon a distinction which bears a fair and substantial relationship to the object of the legislation so that all who are similarly situated are treated alike." *First Federal Savings & Loan Assn.* v. *Connelly*, 142 Conn. 483, 491, 115 A. 2d 455, appeal dismissed, 350 U. S. 927, 76 S. Ct. 305, 100 L. Ed. 811; see also *Consolidated Diesel Electric Corporation* v. *Stamford*, 156 Conn. 33, 36, 238 A. 2d 410.

(b) The plaintiffs in the present case contend that there is no real difference between dividends and other forms of investment income and hence the singling out of dividend income for taxation purposes is arbitrary and amounts to a denial of equal protection of the law. Various courts, however, have sustained similar distinctions. In *Welch* v. *Henry*, 305 U. S. 134, 143-44, 59 S. Ct. 121, 83 L. Ed. 87, the United States Supreme Court upheld a state tax on dividends saying: "We think that the selection of such income for taxation at rates and with deductions not shown to be unrelated to an equitable distribution of the tax burden is not a denial of equal protection commanded by the Fourteenth Amendment. . . . Any classification of taxation is permissible which has reasonable relation to a legitimate end of governmental action. . . . And the distribution of a tax burden by placing it in part on a special class which

by reason of the taxing policy of the state has escaped all tax during the taxable period is not a denial of equal protection." Among a plethora of decisions upholding analogous distinctions are: *Randolph* v. *Simpson*, 410 F. 2d 1067, 1068 (5th Cir., 1969) (Florida ad valorem tax differently treating tangible and intangible personal property upheld); *Barhorst* v. *St. Louis*, 423 S. W. 2d 843, 846 (Mo.) (distinction between earned and unearned income upheld); *Personal Loan & Finance Co.* v. *Oklahoma Tax Commission*, 437 P. 2d 1015, 1020 (Okla.) (distinction between "single" corporations and those with "parents" upheld); *Johnson* v. *Donovan*, 290 Minn. 421, 188 N. W. 2d 864 ("recreational vehicles" a legitimate category for special tax treatment); *In re Opinion of the Justices*, ... N. H. ....., 276 A. 2d 821, 822 (gross income of individuals and business entities subject to tax at different rates).

It is not the province of this court to pass on the wisdom of the General Assembly's decision nor, despite the plaintiffs' arguments to the contrary, does the speed with which it enacted the legislation necessarily affect its validity. "Only if it appears that there is no rational basis for the classification so that it is patently arbitrary may it be set aside as patently arbitrary." *Virgo Corporation* v. *United States*, 384 F. 2d 569, 586 (3d Cir.). "As long as the statute may be justified on any reasonable theory, the legislature's determination will be upheld." *WHYY, Inc.* v. *Glassboro*, 50 N. J. 6, 13, 231 A. 2d 608.

We conclude that the plaintiffs have not sustained their heavy burden of showing that the legislature's decision to tax dividends while leaving other investment income untaxed is clearly capricious, arbitrary and unconstitutionally discriminatory as to them and that they have not successfully negatived "every conceivable basis which might support it." *Madden* v. *Kentucky*, 309 U. S. 83, 88, 60 S. Ct. 406, 84 L. Ed. 590.

We find ourselves in agreement with the comment by Professor Lester B. Snyder of the University of Connecticut School of Law in his article entitled "Tax Policy in the 1971 Connecticut General Assembly," 46 Conn. B. J. 136: "Although the Connecticut dividends and capital gains tax does not tax all intangible property income, it does represent a reasonable legislative attempt to tax the major items of intangible wealth. Interest income was excluded from the tax after a legislative determination that such a tax might be oppressive to low-income, or retired persons. While this judgment is quite debatable as a matter of fact or policy, it is not *per se* unconstitutional. Moreover, a quick glance at the wide variety of selective taxing schemes in this and other states clearly indicates that the long-standing pattern of taxation has been to single out particular items with exclusion or exemption of myriad others. For example, the property tax base in Connecticut, even as it applies to tangible property, has been continuously narrowed, the net effect being to levy a tax on only certain items of personal property and real estate; the Connecticut conveyance tax applies only to certain real estate and not to conveyances of other types of property, such as stocks and bonds; the sales tax is applicable only to particular sales of personal property; and taxes on business net income are levied only if the business happens to be a corporation. These value judgments, as to how broad or narrow to base a tax, must, of necessity, be left to the legislative branch of government under our separation of powers doctrine. Any attempt by the courts to unscramble any part of the complex scheme of state taxation, substituting their own judgment for what is or is not a sound tax policy would subvert the function of the judicial branch and ignore a policy of judicial restraint enunciated by the United States Supreme Court on many occasions in the past."

(c) Applying to the widow's exemption provided in § 12-506(c)(3) of the act, the same tests of constitutionality

which we have already discussed, we come to the conclusion that this exemption provision is invalid. As the plaintiffs properly maintain, the only difference between the status of a "person who is unmarried and a widow on the last day of her taxable year" and a person who is unmarried and a widower is that of sex. "[M]ere difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in which the classification is proposed, and can never be made arbitrarily and without any such basis.'" *Hartford Steam Boiler Inspection & Ins. Co.* v. *Harrison*, 301 U. S. 459, 462, 57 S. Ct. 838, 81 L. Ed. 1223. As we said in *In re Application of Griffiths*, 162 Conn. 249, 258, ... A. 2d .....: "'The basis for a reasonable classification must show such a difference as to justify the division. "A proper classification . . . must embrace all who naturally belong to the class—all who possess a common disability, attribute or qualification and there must be some natural and substantial difference germane to the subject or purposes of the legislation between those within the class included and those whom it leaves untouched."' *St. John's Roman Catholic Church Corporation* v. *Darien*, 149 Conn. 712, 723, 184 A. 2d 42." See also *State* v. *Delgado*, 161 Conn. 536, 290 A. 2d 338.

Insofar as the record discloses, the special exemption granted to a widow is predicated solely on sex and the death of a spouse. While there may be some reason which would justify a tax statute which sets apart surviving spouses as a class for special treatment and within that class a subclass of female surviving spouses, no valid reason whatsoever for the latter discrimination solely on the basis of sex is disclosed in the body of the act nor has any been suggested to us. No other qualification such as need, a minimum income, dependent children or physical handicap is made a basis for this classification. Since all persons who have attained the age of sixty-five are granted the same

exemption (§ 12-506[c][2]) the discrimination cannot be justified on the basis that women have a statistically greater life expectancy. A statute which on its face discriminates on the basis of sex establishes "a classification subject to scrutiny under the Equal Protection Clause." *Reed* v. *Reed*, 404 U. S. 71, 75, 92 S. Ct. 251, 30 L. Ed. 2d 225. The equal protection clauses of the state and federal constitutions apply to all persons regardless of their sex. In *Reed* v. *Reed, supra*, the United States Supreme Court recently held that a provision of the Idaho probate code which gave preference to men over women when persons of the same entitlement class apply for appointment as administrator of a decedent's estate was unconstitutionally discriminatory, saying: "In applying that clause [the equal protection clause], this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. *Barbier* v. *Connolly*, 113 U. S. 27 (1885) [5 S. Ct. 357, 28 L. Ed. 923]; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61 (1911) [31 S. Ct. 337, 55 L. Ed. 369]; *Railway Express Agency* v. *New York*, 336 U. S. 106 (1949) [69 S. Ct. 463, 93 L. Ed. 533]; *McDonald* v. *Board of Election Commissioners*, 394 U. S. 802 (1969) [89 S. Ct. 1404, 22 L. Ed. 2d 739]. The equal protection clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike,'" citing *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, 415, 40 S. Ct. 560, 64 L. Ed. 989. The unanimous opinion by Chief Justice Burger concluded by saying: "By providing dissimilar treatment for men and women who are thus similarly situated, the

challenged section violates the Equal Protection Clause." *Reed* v. *Reed*, *supra*, 77. There is nothing in the act itself which suggests any permissible legislative policy which would constitutionally justify discrimination because of sex in the amount of exemption allowed taxpayers by the act nor has any valid reason for this discrimination on the basis of sex been given on this reservation. In these circumstances, we must conclude that the discrimination solely on the basis of sex between the tax exemption afforded to persons who are widows on the last day of their taxable years vis-a-vis persons who are widowers on the last day of their taxable years is constitutionally impermissible in that it violates the equal protection clause. In the absence of some valid reason to the contrary, men and women similarly situated must be treated equally under the law.

It is pertinent to add that the invalidity of this one provision of the act does not result in the entire act being invalid. "To hold that legislation is valid as to one part and invalid as to another is not anomalous but consonant with principles long established. *State* v. *Wheeler*, 25 Conn. 290, 299. Where two or more parts of a statute are challenged, the test is whether they are so mutually connected and dependent as to indicate a legislative intent that they should stand or fall together. *Branch* v. *Lewerenz*, 75 Conn. 319, 324, 52 A. 658. If that test is applied to this case, it is clear that the part we sustain is separate and distinct from the part we hold to be invalid. They are entirely severable provisions." *Amsel* v. *Brooks*, 141 Conn. 288, 300, 106 A. 2d 152.

II.

We next consider the claim of the plaintiffs that "[c]hapter 224 is so ambiguously worded, internally inconsistent, unintelligible and loosely drafted as to be void for vagueness under the applicable due process provisions of the state and federal constitutions." They assert that "[a]

declaration by this Court that this Chapter is void for vagueness would have a salutary effect upon the legislative process in this State. It would encourage the General Assembly to meet its responsibilities by drafting tax legislation which is carefully considered and properly constructed rather than the midnight madness which this legislation portrays." The act is not free from ambiguity and certainly lacks the clarity to be desired and expected in revenue raising legislation. As specific problems arise and cases are presented for adjudication and a determination of the proper interpretation and application of the provisions of the act to particular situations, they will have to be resolved in due course. We must, however, decline to advise on abstract principles of law or to answer such a broad question as: "Are any of the sections of Chapter 224 void for vagueness?" See *United Oil Co.* v. *Urban Redevelopment Commission*, 158 Conn. 364, 373, 260 A. 2d 596; *Adams* v. *Rubinow*, 157 Conn. 150, 168, 251 A. 2d 49; *Holt* v. *Wissinger*, 145 Conn. 106, 109, 139 A. 2d 353.

This principle applies as well to the claim of the plaintiffs that the act fails to provide definite procedural relief which satisfies the requirements of due process of law. The act expressly provides (§ 12-521) that any person aggrieved by the action of the tax commissioner in fixing the amount of any tax, penalty or interest provided by chapter 224 may apply to the commissioner for a hearing and a correction. Section 12-522 provides for an appeal to the Superior Court by any person aggrieved because of any order, decision, determination or disallowance of the tax commissioner. There is no suggestion in the plaintiffs' complaint or in the stipulation of facts that any of the plaintiffs have even sought procedural relief, much less been denied due process of law in any manner concerning any relief to which a right has been asserted. As we have already stated, "a plaintiff, in challenging the constitutionality of a statute, must sustain the burden of proving that the effect or impact of

the challenged statute on him adversely affects a constitutionally protected right which he proves he has. 'This means a right which he proves that he has under the facts of his particular case and not merely under some possible or hypothetical set of facts not proven to exist.'" *Adams* v. *Rubinow*, *supra*, 152. "A statute may operate in a manner consistent with constitutional requirements when applied to one set of circumstances, although as to another it may produce a result which makes its operation unconstitutional. . . . Put another way, the constitutional validity of a statute must be tested by its effect on the one who challenges it under the particular circumstances of his case and not under some other and different circumstances." *State* v. *Sul*, 146 Conn. 78, 81, 147 A. 2d 686.

III.

A further contention of the plaintiffs is that the act unlawfully delegates to the tax commissioner power to adopt and enforce rules and regulations relating to the administration and enforcement of the act and by references to federal income tax law has improperly delegated to the United States Congress a portion of the legislative power of the Connecticut General Assembly.

As to the first of these contentions, it is the claim of the plaintiffs that the authority granted to the tax commissioner under §§ 12-508, 12-510, 12-516, 12-517 and 12-518 of the act violates the constitution of Connecticut, article first, § 8, articles second and third, § 1, in that it is an unlawful delegation of legislative power to the commissioner. In addition, they contend that these sections of the act undertake to delegate substantial duties to the commissioner without prescribing adequate standards for the exercise of his discretion. These contested sections of the act authorize the tax commissioner to prescribe forms for tax returns, to require the submission of data and records pertinent to

the determination of the amount of tax due, to investigate and verify the accuracy of returns and, in general, to adopt and enforce rules and regulations relating to the administration and collection of the tax.

There is a clear distinction between the legislative function of defining and imposing a tax, which function is nondelegable, and the ministerial and administrative procedures to be followed in the assessment and collection of the tax. It is well established that "[a] Legislature, in creating a law complete in itself and designed to accomplish a particular purpose, may expressly authorize an administrative agency to fill up the details by prescribing rules and regulations for the operation and enforcement of the law." *State* v. *Stoddard*, 126 Conn. 623, 628, 13 A. 2d 586. The power granted to an administrative board or official may include, but is not limited to, the establishment of filing requirements, the hearing of administrative appeals, the finding of facts, and the determination of when as opposed to how and to what extent a tax may be imposed. See *Moore* v. *Langton*, 92 R. I. 141, 167 A. 2d 558; *Opinion of the Justices*, 96 N. H. 513, 68 A. 2d 859; *Opinion of the Justices*, 97 N. H. 533, 81 A. 2d 845.

The legislative power constitutionally to delegate authority is, of course, not unlimited. For a delegation to be constitutionally sustained, "it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform, with a proper regard for the protection of the public interests with such degree of certainty as the nature of the case permits, and enjoin a procedure under which, by appeal or otherwise, both public interest and private rights shall have due consideration." *State* v. *Stoddard*, *supra*.

It is the plaintiffs' principal contention that the legislature failed to define with the requisite specificity primary

standards governing the exercise of the tax commissioner's authority and that as a result "[t]he defects of the statute itself, combined with the lack of adequate standards, has fashioned the Commissioner into a legislator, and in many cases into a judge." We do not agree. While the act does not expressly state the purpose for which it was enacted, it can hardly be doubted, in the light of its legislative history, that the act was designed to raise much needed revenue in a manner consistent with the now generally settled federal practices and principles of income taxation. The General Assembly specifically levied the tax, prescribed the rate and defined the income subject to taxation as well as the persons who are required to pay. §§ 12-505, 12-506. It then authorized the tax commissioner to (1) prescribe the information required of the taxpayer, (2) to design forms for returns, (3) to require the submission of copies of federal income tax returns and supporting records, (4) to extend time limitations, and (5) to promulgate regulations for enforcement of the act and collection of the prescribed tax. §§ 12-508, 12-510, 12-516, 12-517, 12-518. In the comprehensive and complex area of taxation of income, it is neither uncommon nor unwise for a legislature to defer to the expertise of an official or group of officials in the areas of regulations and administration. See *Commissioner of Internal Revenue* v. *Stidger*, 386 U. S. 287, 296, 87 S. Ct. 1065, 18 L. Ed. 2d 53; *Anderson* v. *Tiemann*, 182 Neb. 393, 401, 155 N. W. 2d 322; *Columbia Gulf Transmission Co.* v. *Barr*, 194 So. 2d 890, 895 (Miss.). "The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legisla-

tion." *Field* v. *Clark*, 143 U. S. 649, 694, 12 S. Ct. 495, 36 L. Ed. 294.

As long as revenue legislation sets out with specificity the rate of the tax, the instances where it is to be imposed and those who will be liable to pay it, there is no impermissible delegation of legislative power merely because the details of regulation and enforcement are left to administrative action. The plaintiffs have not established that the act unconstitutionally delegates to the tax commissioner any of the legislative powers of the General Assembly or that the standards the act prescribes for the exercise of the administrative and enforcement powers granted to the commissioner are not precise enough to serve as a "sufficient guide for the exercise of the discretion" which he must exercise. *Connecticut Baptist Convention* v. *McCarthy*, 128 Conn. 701, 705, 25 A. 2d 656. As we noted in *Hardware Mutual Casualty Co.* v. *Premo*, 153 Conn. 465, 480, 217 A. 2d 698, it is always conceivable that maladministration of the statute by the commissioner, in disregard of primary standards prescribed by the legislation might constitute action which would have an unconstitutional impact on a taxpayer. "But," as we there said, "that is not this case. The plaintiffs have wholly failed to prove any such impact on themselves. This court cannot strike down a legislative enactment as unconstitutional merely because difficulties may be encountered in its administration, or on the mere possibility that it may be improperly administered. *Lyman* v. *Adorno*, 133 Conn. 511, 530, 52 A. 2d 702."

The plaintiffs' second contention in this context is that the act's incorporation by reference of federal income tax law amounts to an unlawful delegation to Congress of the legislative power of the General Assembly and violates the tenth amendment to the constitution of the United States as well as article first, § 8, articles second and third, § 1 of the constitution of Connecticut. Their claim is that although

General Assembly may properly incorporate by refer-
e any provision of federal law, any incorporation of
s nature must necessarily make reference to the incorpo-
ed law as it existed on a particular date. They point out
t the various corporation business tax statutes previ-
ly considered by this court make reference to federal
as it existed "on the last day of the income year."
First Federal Savings & Loan Assn. v. *Connelly*, 142
nn. 483, 492, 115 A. 2d 455, appeal dismissed, 350 U. S.
, 76 S. Ct. 305, 100 L. Ed. 811; *Singer Mfg. Co.* v. *Gil-
ric*, 98 Conn. 192, 196, 118 A. 919. Thus, they contend
t since the act does not expressly adopt federal income
law as it existed on a specific date that it must, accord-
ly, be construed to refer not only to the federal tax law
it existed when the act was passed but also to any future
endments which may be adopted by Congress. It is their
sition that this constitutes an attempt by the General
sembly to adopt federal tax law as it may be enacted by
ngress in the future and hence is not a lawful incorpora-
n by reference but is rather an unconstitutional delega-
n of state legislative power to the Congress.

We are constrained to note that the validity of this argu-
nt is questionable since it is predicated on an assump-
n that the statute must be construed as an attempt by
e General Assembly to adopt amendments which Con-
ess may in the future make to federal tax law. Since
e act makes no express provision in this regard, the in-
rpretation claimed by the plaintiffs is not a necessary one.
e *Anderson* v. *Tiemann, supra.* "Statutes are to be con-
ued in light of their legislative history, their language,
e purpose they are to serve, and the circumstances sur-
unding their enactment. *Connecticut Light & Power Co.*
Sullivan, 150 Conn. 578, 581, 192 A. 2d 545; *Mack* v.
ars, 150 Conn. 290, 294, 188 A. 2d 863; *Oppenheimer* v.
nnecticut Light & Power Co., 149 Conn. 99, 102, 176 A.
63." *Hartford Electric Light Co.* v. *Water Resources*

Commission, 162 Conn. 89, 97, ... A. 2d ..... Furthermore, even if the interpretation which the plaintiffs claim is a correct one and the act were construed to incorporate not only federal tax law as it existed in 1971 when the act was adopted but also such amendments as Congress might adopt in the future, there is at least some authority that such legislation is constitutionally permissible. See *Alaska Steamship Co.* v. *Mullaney*, 84 F. Supp. 561 (D. Alas.), affirmed, 180 F. 2d 805 (9th Cir.); *Hickel* v. *Stevenson*, 416 P. 2d 236, 238 (Alas.); *In re Lasswell*, 1 Cal. App. 2d 183, 36 P. 2d 678; *People ex rel. Pratt* v. *Goldfogle*, 242 N. Y. 277, 151 N. E. 452; *Commonwealth* v. *Alderman*, 275 Pa. 483, 151 N. E. 452; but see *Wallace* v. *Commissioner of Taxation*, 289 Minn. 220, 184 N. W. 2d 588; *Hutchins* v. *Mayo*, 143 Fla. 707, 197 So. 495; *Thorpe* v. *Mahin*, 43 Ill. 2d 36, 250 N. E. 2d 633; *State* v. *Intoxicating Liquors*, 121 Me. 438, 442, 117 A. 588; *Featherstone* v. *Norman*, 170 Ga. 370, 153 S. E. 58; *Cheney* v. *St. Louis Southwestern Ry. Co.*, 239 Ark. 870, 872, 394 S. W. 2d 731; *Santee Mills* v. *Query*, 122 S. C. 158, 115 S. E. 202; *State ex rel. Kirschner* v. *Urquhart*, 50 Wash 2d 131, 310 P. 2d 261; *Dawson* v. *Hamilton*, 314 S. W. 2d 532 (Ky.); *Opinion of the Justices*, 239 Mass. 606, 133 N. E. 453.[3]

We refrain, however, from determining at this time this question of statutory interpretation and constitutional law. The precise question has neither been properly raised nor adequately presented in these proceedings. Moreover, the stipulation of facts does not indicate nor has our attention been called to any changes in federal tax law relevant to the issues in this case which have been effected since the passage of the act. The plaintiffs have not demonstrated how their rights have in any way as yet been infringed by

3. It is to be noted that some states have avoided any question about this problem by means of amendment of their constitutions. See *Matter of Garlin* v. *Murphy*, 51 Misc. 2d 477, 273 N. Y. S. 2d 374; N. Y. Const., art. 3 § 22; Colo. Const., art. 10 § 9.

the provisions of these portions of the act, and we will not presume that the General Assembly will not enact further or clarifying legislation at or before the time any change in the federal tax law becomes effective. At the present time, so far as the plaintiffs are concerned, the issue is merely academic and this court will not answer merely academic questions. *Congress & Daggett, Inc.* v. *Seamless Rubber Co.*, 145 Conn. 318, 323, 142 A. 2d 137; *Burns* v. *Seymour*, 141 Conn. 401, 406, 106 A. 2d 759.

IV.

A further contention of the plaintiffs is that a proper interpretation of § 12-506[4] of the act requires that the basis for computing a capital gain or loss can be no earlier than December 31, 1970. Their argument is threefold: First, they maintain that § 12-506 of the General Statutes should, as a matter of statutory construction, be interpreted not to adopt the federal basis for the taxation of capital gains but to tax, when realized, only accretions in value after December 31, 1970. Second, they argue that § 55-3[5] of the General Statutes requires that § 12-506 be construed to allow the taxpayer to use instead of the federal basis for computing capital gains the fair market value of the asset on December 31, 1970. Finally, they contend that if the statute is construed as adopting the federal basis for the computation of capital gain that such a construction would

4. "[Public Acts, Spec. Sess., June 1971, No. 8 § 10] Sec. 12-506. IMPOSITION OF TAX. (a) A tax is hereby imposed at the rate of six per cent on all dividends and gains from the sale or exchange of capital assets occurring after December 31, 1970, which have been earned, received in fact or constructively, accrued or credited to the taxpayer during his taxable year subject to the exemptions allowed in subsection (c) of this section."

5. "[General Statutes] Sec. 55-3. LIMITATION OF EFFECT OF CERTAIN ACTS. No provision of the general statutes, not previously contained in the statutes of the state, which imposes any new obligation on any person or corporation, shall be construed to have a retrospective effect."

render the statute impermissibly retroactive under the United States and Connecticut constitutions.

The plaintiffs' arguments center around the words in § 12-506 which impose a tax "on all dividends and gains . . . occurring after December 31, 1970." Their contention is that the word "occurring" as it is used in the statute is synonymous with the term "happening" and that the latter carries with it a connotation different and distinct from the traditional federal income tax concept of realization of gain or loss. We do not agree. "Courts, in construing statutes, consider their legislative history, their language, their purpose, and the circumstances surrounding their enactment." *Mack* v. *Saars*, 150 Conn. 290, 294, 188 A. 2d 863; *Delinks* v. *McGowan*, 148 Conn. 614, 618, 173 A. 2d 488. "Legislative intent is to be found not in what the legislature meant to say but in the meaning of what it did say. *Mad River Co.* v. *Wolcott*, 137 Conn. 680, 686, 81 A. 2d 119. We are called upon to look beyond the literal meaning of the words to the history of the law, its language, considered in all its parts, the mischief the law was designed to remedy, and the policy underlying it. *Giammattei* v. *Egan*, 135 Conn. 666, 668, 68 A. 2d 129. We must look, also, to the basic policy as disclosed by pre-existing legislation and the circumstances which brought about the enactment of the law under consideration. *Cedar Island Improvement Assn.* v. *Clinton Electric Light & Power Co.*, 142 Conn. 359, 364, 114 A. 2d 535." *Lee* v. *Lee*, 145 Conn. 355, 358, 143 A. 2d 154. "When two constructions are possible, courts will adopt the one which makes the statute effective and workable, and not one which leads to difficult and possibly bizarre results." *Muller* v. *Town Plan & Zoning Commission*, 145 Conn. 325, 331, 142 A. 2d 524; *Bridgeport* v. *Stratford*, 142 Conn. 639, 644, 116 A. 2d 508.

From a close examination of the entire act, it is obvious that the legislature intended to incorporate and adopt the

federal basis for computation of capital gain and loss.[6] Section 12-505 specifically states: "Gains from the sale or exchange of capital assets means net gains as defined for federal income tax purposes." While there is some ambiguity in the meaning of "net gains" (a problem which we will discuss later in this opinion), we believe that the reference to the federal income tax structure is of controlling significance and decisive on the question of what basis is to be used in computing the tax on gains from the sale or exchange of capital assets.

"For federal income tax purposes" a capital gain is one "realized" through a sale or exchange of the asset. Internal Revenue Code § 1001(a); *MacLaughlin* v. *Alliance Ins. Co.*, 286 U. S. 244, 249, 52 S. Ct. 538, 76 L. Ed. 1083. Absent such a sale or exchange, no taxable event has taken place even though the asset may, from an investment standpoint, be worth more to the holder than its initial cost plus adjustments for improvements. While the plaintiffs appear to agree that under the provisions of the act realization of gain is the taxable event,[7] they nevertheless contend that the only gains which "occur" after December 31, 1970, are the increases in value of the asset after that date. Thus, while they accept the established concept of no taxation until realization, they reject the equally well established corollary principle that when gains are realized they are then taxed on the difference between the value at the time of sale or exchange and the adjusted basis which is usually the initial cost.[8]

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6. For a discussion of cases involving state legislation incorporating by reference the provisions of the federal Internal Revenue Code as they affect the determination of capital gains and losses, see Coyne, "State Taxation of Capital Gains: Is Use of the Federal Basis Constitutional?" 24 National Tax Journal 521.

7. There is at least some indication that, for federal purposes, gains not realized may not constitutionally be taxed. See *Eisner* v. *Macomber*, 252 U. S. 189, 214, 40 S. Ct. 189, 64 L. Ed. 521.

8. Under the provisions of § 1053 of the Internal Revenue Code, if the asset was purchased by the taxpayer prior to March 1, 1913,

We find no indication either in the language of the act itself or in its legislative history that the General Assembly intended to adopt any other standard for taxing capital gain than that employed for federal tax purposes to which standard the act makes specific reference. Only gains realized after December 31, 1970, are taxed under the act. The fact that the amount of the tax depends, among other things, on the cost of the asset which may have been acquired prior to the enactment of the tax does not make the tax retrospective. The tax being imposed at the time of realization of the gain operates only in a prospective manner and, accordingly, does not operate counter to the proscription of § 55-3 of the General Statutes.

The plaintiffs argue that the act so interpreted violates the due process of law provisions of the United States and Connecticut constitutions. Their argument is, essentially, that a taxpayer's cost basis may have as its origin a transaction or valuation which took place over fifty years ago and thus the tax imposed on the profit resulting from the sale of the asset is not only retroactive but excessively so and constitutes a denial of due process. This argument, however, disregards the concept of taxation of the realization of the capital gain. While the value of a taxpayer's property may increase over a period of years, he realizes the profit and capital gain only on the sale or exchange of the property. The established concept of capital gain taxation and as it is implemented in the act is that the tax is levied on the final transaction, not on the gradual accretion in value.

There is authority for the proposition that a tax may be declared unconstitutional as a violation of due process

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then his basis, subject to adjustment, is the fair market value of the asset on March 1, 1913. In addition, there are numerous other sections of the Internal Revenue Code which define, adjust or allocate a taxpayer's basis depending on the circumstances surrounding a transaction. See, for example, Internal Revenue Code §§ 301(d), (f), 307, 1336 and others.

when it is imposed on an event which took place long before the taxing statute was enacted; see *People ex rel. Beck* v. *Graves,* 280 N. Y. 405, 21 N. E. 2d 371; but that circumstance is not present here. The capital gains tax is not levied on paper profits which accrue to the taxpayer while he owns the property but on profits which are, in fact, realized by the taxpayer when he sells the asset. The distinction was well pointed out by the United States Supreme Court in *MacLaughlin* v. *Alliance Ins. Co.,* 286 U. S. 244, 249, 250, 52 S. Ct. 538, 76 L. Ed. 1083, which dealt with a similar problem involving retroactivity, "[r]ealization of the gain is the event which calls into operation the taxing act, although part of the profit realized in one accounting period may have been due to increase of value in an earlier one. While increase in value of property, not realized as gain by its sale or other disposition, may, in an economic or bookkeeping sense, be deemed an addition to capital in a later period, . . . it is nevertheless a gain from capital investment which, when realized, by conversion into money or other property, constitutes profit which has consistently been regarded as income within the meaning of the Sixteenth Amendment and taxable as such in the period when realized. . . . Congress, having constitutional power to tax the gain, and having established a policy of taxing it, . . . may choose the moment of its realization and the amount realized, for the incidence and the measurement of the tax. Its failure to impose a tax upon the increase in value in the earlier years, assuming without deciding that it had the power, cannot preclude it from taxing the gain in the year when realized, any more than in any other case, where the tax imposed is upon realized, as distinguished from accrued, gain."

Various state courts when considering similar problems of retroactivity of taxing statutes have reached substantially identical conclusions. *Fullerton Oil Co.* v. *Johnson,* 2 Cal. 2d 162, 168, 39 P. 2d 796; *Fidelity & Columbia Trust*

Co. v. *Reeves*, 287 Ky. 522, 154 S. W. 2d 337; *City National Bank* v. *State Tax Commission*, 251 Iowa 603, 102 N. W. 2d 381; *Norman* v. *Bradley*, 173 Ga. 482, 160 S. E. 413; *Sweetland* v. *Franchise Tax Board*, 192 Cal. App. 2d 316, 13 Cal. Rptr. 432; *Olvey* v. *Collector of Revenue*, 233 La. 985, 99 So. 2d 317. *Thorpe* v. *Mahin*, 43 Ill. 2d 36, 250 N. E. 2d 633, appears to have reached a contrary conclusion but the decision was based primarily on the court's interpretation of the Illinois statute—Ill. Rev. Stat. c. 120, art. 2 (1969)—which expressly provided that the tax should operate prospectively beginning August 1, 1969.

A tax on realized capital gain does not operate in a retroactive manner merely because ascertainment of the amount of the gain is measured by the difference between the sale price received during the tax year and the taxpayer's basis which may have been established at some earlier time. The act is retroactive only to the extent that it taxes the realization of gain after December 31, 1970. This limited retroactive application is of no consequence. *Welch* v. *Henry*, 305 U. S. 134, 148, 59 S. Ct. 121, 83 L. Ed. 87.

V.

The remaining questions reserved for our advice involve questions of interpretation of the language of three provisions of the act. The first and most important is whether in computing the amount of tax owed a deduction is allowed for long term capital gains equivalent to the deduction provided to taxpayers by § 1202 of the Internal Revenue Code. As noted before, the tax is imposed on "all dividends and gains from the sale or exchange of capital assets" which, by the terms of § 12-505, means "net gains as defined for federal income tax purposes, after due allowance for losses and holding periods." The plaintiffs maintain that this language incorporates § 1202 of the Internal Revenue Code which provides for a deduction from gross income of 50

percent of the excess of net long term capital gain less net short term capital loss. Under that section of the Internal Revenue Code, assuming that one does not select the alternative tax for long term capital gains, effectively only one-half net capital gain which is long term is subject to the federal income tax. The precise question we are called on to answer then is whether "net gains" as that term is used in § 12-505 should be computed in accordance with § 1202 of the Internal Revenue Code which provides preferential treatment for gains from the sale or exchange of assets which are classed as long term capital gains. In other words, does the language of § 12-505 mean that the proper base on which the 6 percent tax is imposed is 100 percent of net capital gain which is long term or 50 percent?

Despite its obvious importance in the tax plan implemented by the act, the language chosen by the legislature to define the base for imposition of the tax on capital gain is singularly lacking in clarity. As we have noted, § 12-505 defines "gains from the sale or exchange of capital assets" to mean "net gains as defined for federal income tax purposes, after due allowance for losses and holding periods but not nonrecognition of gains, all as provided under federal income tax law." A close examination of the federal Internal Revenue Code, however, discloses that neither the term "net gains" nor its singular counterpart is used in those federal statutes. To the extent that the term is used on the federal tax form for individual returns, it is devoid of meaning in the present context since "net gain" is used to describe the amount of gain both before and after the allowance of the § 1202 deduction. In these circumstances, we must seek to ascertain the meaning of the statute by the application of the settled rules for statutory construction to which we have hereinbefore referred, including a careful analysis not only of the language of the act but the history and policy underlying it. *Connecticut Light & Power Co.* v. *Sullivan*, 150 Conn. 578, 581, 192 A. 2d 545.

Some guidance is found in the repeated references to federal income tax law and particularly the provision that the taxable net gains are those defined for federal income tax purposes "after due allowance for losses and holding periods." While the reference to losses has little relevance to our present problem, the phrase "holding periods" does have decided significance. Under § 1222 of the federal Internal Revenue Code, a taxpayer may treat an item of capital gain or loss as long term only if the gain or loss results from "the sale or exchange of a capital asset held for more than 6 months." Since § 12-505 refers to "holding periods" there is a clear indication that the legislature intended by the use of that term to afford a different treatment to long term as opposed to short term capital gains. That differing treatment will only result if the 50 percent deduction for net long term capital gains less net short term capital losses is allowed.

The defendants contend that the phrase "after due allowance for losses and holding periods" as it is used in § 12-505 is not intended to define "net gains" but to modify the word "losses." Thus, they maintain that the reference to "holding periods" in the statute only affects the treatment of losses and not the treatment of gains. In support of this position, they rely on § 1211(b) of the federal Internal Revenue Code as amended in 1969. That particular section allows a taxpayer to deduct from ordinary income a portion of his net loss if his capital losses exceed his capital gains. Similarly, § 1212(b) of the federal Internal Revenue Code provides for long and short term adjustments to loss carryovers.

While the defendants are undoubtedly correct in their assertion that holding periods are an integral part of both of these federal tax provisions, this fact is not of significance in relation to the tax on capital gains imposed by the

act. Section 1211(b) of the federal Internal Revenue Code defines the tax consequences when, in any given year, the total of a taxpayer's capital transactions results in a net loss. Since § 12-505 of the General Statutes imposes a state tax on only "dividends and *gains*" (emphasis added) it is clear that a Connecticut taxpayer will not, in any one year where losses exceed gains, have a state tax liability resulting from his capital transactions, since, in that circumstance, he will have no net gain. In a year of net capital loss, the only effect § 1211(b) of the federal Internal Revenue Code will have on a taxpayer's total state tax liability is a lessening of his adjusted federal income and consequent increase in the § 12-506(c)(1) exemption which will be applied to his taxable dividend income. Similarly, § 1212(b) of the federal Internal Revenue Code deals only with the computation of capital loss carry-over. While it is conceivable that application of the complex rules of that section will affect a taxpayer's state capital gains tax liability in future years depending on whether the assets sold to produce a net capital loss were held for more than six months, the application of this particular meaning of "holding periods" produces a rather curious result. The defendants would have us hold that an individual is taxed on the full amount of his capital gain without regard to its long or short term character yet, if a net capital loss is sustained in any one tax year, then a whole set of complex rules, wholly dependent on the length of time the assets were held, would come into play. It is inconceivable that the legislature intended this result particularly in light of their use of the phrase "all as provided under federal income tax law" immediately after the reference to allowances for holding periods and losses. While the statutory language is far from unambiguous, the most reasonable interpretation of this language is that it was intended to permit the allowance of the § 1202 deduction.

The defendants also call our attention to § 1250 of the federal Internal Revenue Code and point out that that particular section deals with both capital gains and holding periods. Section 1250 is the compilation of a rather complex set of rules governing the treatment of gain from the sale or exchange of certain depreciable realty. Without dwelling on its subtleties, it is sufficient to note that § 1250 provides that under certain circumstances gain from the sale of property on which depreciation allowances were allowed will be treated as ordinary income. The effect of this section then, as far as Connecticut is concerned, is to reduce the amount of state taxable gain. But the operation of § 1250 on the Connecticut capital gains and dividends tax is not by virtue of the reference in § 12-505 to "holding periods" but rather by virtue of the repetitive reference in the statute to federal income tax law.

The defendants' arguments relative to specific sections of the federal Internal Revenue Code merely enumerate possible sections to which the term "holding periods" may refer but they in no way illustrate why § 12-505 does not incorporate by reference all sections of the federal Internal Revenue Code when it refers to "net gains as defined for federal income tax purposes." In this regard, the defendants contend that "net gains" as the term is used in the statutes must refer to "net capital gain" which is defined by § 1222(9) of the federal Internal Revenue Code to be the excess of gains from sales or exchanges of capital assets over the losses from such sales or exchanges without reference to the 50 percent deduction for net long term capital gains less short term capital losses provided by § 1202. While it is certainly possible that the legislature meant to use the term "net capital gain" rather than "net gain" it nevertheless did not do so. "It is the expressed intent of the legislature which controls, and that intent is to be found in the meaning of what it says"; *Adams* v. *Vaill*, 158 Conn. 478, 483, 262 A. 2d 169; and not some unexpressed

or supposed state of mind of the General Assembly. See *Rivera* v. *I. S. Spencer's Sons, Inc.*, 154 Conn. 162, 166, 223 A. 2d 808. The language of the statute shows a clear intent on the part of the legislature to adopt, insofar as it was practical, the federal system for taxing capital gains income. When it departed from the federal income tax law, it did so specifically. In this light, it would be unwarranted and unreasonable to hold that "net gains" as that term is used in § 12-505 of the General Statutes did not incorporate the 50 percent deduction of net long term capital gains less net short term capital loss provided for in § 1202 of the federal Internal Revenue Code.

This interpretation of the act finds support not only in the language of the statute itself but most significantly in its legislative history. The first capital gains tax was enacted by the General Assembly in 1969 by Public Act No. 1 of the June 1969 session of the General Assembly, printed as chapter 224 (§§12-505 through 12-522 of the General Statutes). This act, which we will hereafter refer to as the 1969 act, was repealed by the 1971 act which is the subject of the present action. While the language of the 1969 act was different in many respects from the one under consideration here, it did define gains from the sale or exchange of capital assets to mean "'net gain' as that amount is computed under the internal revenue code of the United States." In Regulation No. 12-518-1(a) and (b), the tax commissioner ruled that the 1969 statute applied to capital gains "which are recognized and taxable for federal income tax purposes . . . 'net gain' means the combination of net long-term capital gains and net short-term capital gains less the smaller of fifty per cent of such combination or fifty per cent of net long-term capital gain." The Tax on Capital Gains, 31 Conn. L. J., No. 23, p. 11. Thus, when the General Assembly enacted Public Act No. 8 on the same subject during the 1971 special session, it can

be presumed that it did so with knowledge of the tax commissioner's interpretation of the phrase "net gain" and his regulation for payment of the tax on 50 percent rather than 100 percent of net long term capital gain less net short term capital loss. While the 1971 legislature made some minor changes from the language of the 1969 act, such as changing "net gain" to "net gains" and "as that amount is computed under the internal revenue code of the United States" to "as defined for federal income tax purposes" it also expressly added the further provision "all as provided under federal income tax law." The conclusion is inescapable that the 1971 legislature used the term "net gains" not only in the light of federal income tax practice but in light of the definition of that term in the administrative regulation then in force. *Shell Oil Co.* v. *Ricciutti*, 147 Conn. 277, 285, 160 A. 2d 257. If it in fact intended to deviate from federal income tax policy and to change existing state law by imposing the tax on 100 percent of net capital gain rather than allowing the § 1202 deduction, it could easily have so indicated. We not only find no such indication but the changes which were adopted in 1971 indicate to the contrary. We conclude that the answer to reserved question 17 is "No" and the answer to reserved question 18 is "Yes" and that insofar as the deduction for 50 percent of net long term capital gain less net short term capital loss is concerned it must be allowed.

The last two inquiries raised on this reservation concern the exemption afforded all taxpayers under § 12-506(c) of the General Statutes and the question whether net capital loss may be used to offset dividend income. As to the first problem, § 12-506(c)(1) provides that the normal exemption shall be $2000 "multiplied by a fraction whose numerator is dividend and capital gain income" and whose denominator is the taxpayer's federal adjusted gross income less certain other specified items of income. The plaintiffs maintain that, under certain circumstances, the

exemption fraction converted to percentage can exceed 100 percent thus resulting in an exemption greater than $2000. An example of this would be a situation where an individual receives all his income from dividends. Since the first $100 of dividend income is not taxed for federal purposes but is taxed under the 1971 act, the exemption fraction in percentage terms will inevitably exceed 100 percent.

From a review of the exhibits which include the 1971 Connecticut Capital Gains Tax Returns of the plaintiffs Marsh and Miller, we note that only the plaintiff Marsh listed an exemption fraction computed at greater than 100 percent. His argument for the greater exemption is based on the fact that the numerator of the exemption factor included the full amount of his capital gains whereas the denominator, his federal adjusted gross income, takes into account the 50 percent deduction provided for by § 1202 of the federal Internal Revenue Code. Our decision on the meaning of "net gain" as that term is used in § 12-505 of the General Statutes effectively sets this controversy to rest as to him since we have concluded that the "capital gain income" which is part of the numerator of the exemption fraction is computed in accordance with the provisions of the federal Internal Revenue Code with due regard for the deduction provided for in § 1202 of that code. Thus, as to these plaintiffs, the question whether under any circumstances the exemption may exceed $2000 is academic and we decline to answer it.

We turn next to the question whether net capital losses may be used to reduce taxable dividends. Section 12-506 provides that a 6 percent tax is imposed on "all dividends and gains." The plaintiffs argue that since gains are computed with regard to an allowance for losses, net capital losses may be used to reduce the total of dividends subject to the tax. We do not agree. The statute provides for the

taxation of only two different forms of income—from dividends and from capital gains. As we have noted, it does not, as does the federal income tax, tax other forms of income such as interest, rents or earnings from labor. Because the state act selects only these two forms of income for taxation, the provision of federal tax law allowing for a limited deduction of net capital loss from total income is not applicable, although we note that to some extent federal law will affect loss carry-overs in years after 1971. See Int. Rev. Code of 1954 §§ 1211(b), 1212(b). The provisions of the federal Internal Revenue Code which are incorporated into computation of the state tax on dividends and capital gains are generally only those which relate to those two specific subjects of tax. The incorporation does not extend to an allowance of net capital losses to reduce taxable dividend income and it does not appear that either the intent or the language of the act permits it. Accordingly, the answer to reserved question 20 is "No."

VI.

The Superior Court is advised as follows: We have been restricted, as we indicated at the beginning of this opinion, to the facts set forth in the stipulation, and on these facts we cannot find that the plaintiffs have sustained their burden of proving unconstitutionality except as to that portion of the act which purports to provide an exemption to any person who is unmarried and a widow on the last day of her taxable year which is two and one-half times the exemption amount as calculated in subdivision (1) of § 12-560(c). As we have noted, some of the questions were not pressed in this court. Some of the remaining questions propounded are academic and as to some others the plaintiffs have not established their entitlement to an answer or an answer cannot be given with greater precision than indicated in our discussion of the question. Subject to

these comments: Questions 1 (a) and (b); 7 (a), (b), (c), (d) and (e); 15 (a) and (b); 17, 19 and 20 in the reservation are answered "No"; and questions 3 (a), (b) and (c); 12, 13, 14, 16 and 18 are answered "Yes."

No costs will be taxed in this court in favor of any party.

In this opinion the other judges concurred.

SUPREME COURT

June Term, 1972

EUGENE F. PETERSON ET AL. v. JOHN L. SULLIVAN, TAX COMMISSIONER

Appeal from a decision of the defendant disallowing the plaintiffs' claim for a tax refund, brought to the Superior Court in Hartford County and reserved by the court, *Rubinow, J.*, for the advice of this court.

James R. Fogarty, Jr., with whom was *Ronald O. Dederick*, for the plaintiffs.

Ralph G. Murphy, assistant attorney general, with whom were *John M. Dunham* and *Richard K. Greenberg*, assistant attorneys general, and, on the brief, *Robert K. Killian*, attorney general, for the defendant.

HOUSE, C. J. Although this case involves many of the same issues which were considered in *Kellems* v. *Brown*, 163 Conn. (34 Conn. L. J., No. 6, p. 1), decided this day and to which we will refer as the *Kellems* case, it concerns an earlier act of the legislature enacted as Public Act No. 1 of the June, 1969, session of the General Assembly, printed as chapter 224, §§ 12-505 through 12-522 of the General Statutes. This act, which we will hereafter refer to as the 1969 act, was repealed effective August 15, 1971, by Public Act No. 8 of the June, 1971, special session of the General Assembly. The action was brought in the nature of an appeal from a decision of the defendant tax commissioner denying the plaintiffs' claim for a refund of a capital gains tax which they had paid. The parties stipulated to the relevant facts and the Superior Court reserved the case to this court for advice.

The plaintiffs are residents of Greenwich, Connecticut. On July 1, 1969, they owned various capital assets which they had acquired prior to that date and which were not situated in Connecticut. During the period from July 1, 1969, through December 31, 1969, they sold or otherwise disposed of those assets in sales or exchanges which were consummated through brokerage firms in New York, where all deliveries occurred. On or before April 15, 1970, they timely filed, on a form prescribed by the tax commissioner, a Connecticut Capital Gains Tax Return for the period July 1 through December 31, 1969, and paid a tax of $17,701.56. This return is hereafter referred to as the "original return." In accordance with the directions of the tax commissioner, the plaintiffs computed their net capital gain in their original return by deducting the adjusted basis, *i.e.*, the cost of the capital assets, from the proceeds derived from the sales and exchanges. On or about July 1, 1970, the plaintiffs filed an amended return covering the same period. This return computed taxable gain or loss by subtracting the fair market value of the assets on July 1, 1969, or their original cost, whichever was greater, from the proceeds derived from their sale or exchange. The resulting computation in their amended return showed a net capital loss. The plaintiffs have claimed a refund of $17,701.56 as an overpayment of their capital gains tax which claim for a refund was denied by the tax commissioner on October 1, 1970. The plaintiffs exhausted all administrative remedies available to them and thereupon took the present appeal. The defendant contends that the plaintiffs' amended return was inaccurate only because it used as the basis for computing capital gain or loss the greater of the plaintiffs' original cost of the assets sold or exchanged or the fair market value thereof as of July 1, 1969.

Section 12-505 of the 1969 act contained definitions.[1] Section 12-506(a) contained the language imposing the tax,[2] and § 12-518 authorized the tax commissioner to adopt and enforce rules and regulations relating to the administration and enforcement of the tax.[3] Eight questions were reserved for the advice of this court. In their brief the plaintiffs have indicated that two of these need not be answered. The remaining six questions are printed.[4]

1. "[General Statutes] Sec. 12-506. DEFINITIONS. When used in this chapter, unless the context otherwise requires: 'Taxpayer' means each and every individual resident in this state who has earnings received, credited or accrued in any taxable year from gains from the sale or exchange of capital assets which exceed the sum of one hundred dollars; 'taxable year' means the same accounting period as the taxpayer's taxable year for federal income tax purposes or that portion of such year as falls within the period July 1, 1969, through June 30, 1971; 'tax commissioner' or 'commissioner' means the state tax commissioner; 'gains from the sale or exchange of capital assets' means 'net gain' as that amount is computed under the internal revenue code of the United States, except that no reduction shall be allowed for loss carry-overs or loss carry-backs."

2. "[General Statutes] Sec. 12-506. IMPOSITION OF TAX. (a) A tax is hereby imposed at the rate of six per cent on all gains from the sale or exchange of capital assets occurring after July 1, 1969, which gains have been earned, received, accrued or credited to the taxpayer during his taxable year. This tax shall not be applicable to gains on the sales or exchanges of capital assets occurring after June 30, 1971."

3. "[General Statutes] Sec. 12-518. ENFORCEMENT, REGULATIONS. The commissioner shall enforce the provisions of this chapter and may adopt and enforce rules and regulations relating to the administration and enforcement of this chapter. The commissioner may prescribe the extent to which any ruling or regulation shall be applied with retroactive effect."

4. "1. In computing the plaintiffs' capital gain on the difference between the amount realized from the sale or exchange of said capital assets and the adjusted basis, i.e. the cost, of such assets, has the defendant Tax Commissioner properly determined the capital gain to be subject to tax pursuant to the Act?

"2. In denying the plaintiffs' claim for refund has the defendant Tax Commissioner improperly determined the capital gain to be subject to tax pursuant to the Act?

"3. If the answer to (1) is 'Yes,' or the answer to (2) is 'No,' does the tax imposed upon the plaintiffs' capital gains under the

Basically, it is the contention of the plaintiffs that the tax commissioner incorrectly interpreted the 1969 act when he denied their claim for a refund, or, alternatively, that if his interpretation of that act was correct, then the act itself is unconstitutional.

Although the language of the 1969 act differs somewhat from that of the 1971 act, the same basic questions of statutory interpretation and constitutionality which we discussed at length in the *Kellems* case are presented by this appeal. Consequently it is neither necessary to repeat in detail much of what we said in the opinion in that case, nor productive to quote extensively from the authorities therein cited and relied on.

The definition of "gains from the sale or exchange of capital assets" in the 1969 act differs slightly from that used in the 1971 act. The 1969 act (§ 12-505) defines it "as that amount is computed under the internal revenue code of the United States, except that no reduction shall be allowed for loss carry-overs or loss carry-backs." The definition in the 1971 act (§ 12-505), which is somewhat longer but similarly keyed to the Internal Revenue Code, states that it means "net gains as defined for federal income tax purposes, after due allowance for losses and holding per-

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Act violate the provisions of Section 55-3 of the General Statutes of Connecticut, Revision to 1958, as amended?

"4. Does the tax imposed upon capital gains under the Act deprive the plaintiffs of their property without due process of law as guaranteed by Section 1 of the Fourteenth Amendment to Constitution of the United States of America and by Article 1, Section 8 of the Constitution of the State of Connecticut?

"5. Does the tax imposed upon capital gains under the Act deprive the plaintiffs of the equal protection of the laws so as to violate Art. I, Section 20 of the Constitution of the State of Connecticut or the Fourteenth Amendment of the Constitution of the United States of America?

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"7. With respect to the plaintiffs, has there been an unlawful delegation of legislative power created in the Act due to the defining of certain terms with reference to the Internal Revenue Code of the United States?

iods, but not nonrecognition of gains, all as provided under federal income tax law." As we noted in the *Kellems* case, the federal capital gains tax which both the 1969 and 1971 acts incorporate is predicated on the concept of taxing the realization of capital gain. "Realization of the gain is the event which calls into operation the taxing act, although part of the profit realized in one accounting period may have been due to increase of value in an earlier one." *MacLaughlin* v. *Alliance Ins. Co.*, 286 U. S. 244, 249, 52 S. Ct. 538, 76 L. Ed. 1083; see also the cases cited on this point in the *Kellems* case. As we pointed out in the *Kellems* case, it is the event of realization of gain by the sale or exchange of a capital asset which is the time fixed for the imposition of the tax. The fact that the gain may be the result of a gradual increase in the value of the asset over a period of years is of no consequence. By the 1969 act the tax is imposed on such gains "occurring after July 1, 1969." § 12-506. By the 1971 act it is on such gains "occurring after December 31, 1970." § 12-506. As both acts specifically incorporate the federal system of taxing capital gain, the defendant tax commissioner was correct in holding that the cost basis for determining the amount of the plaintiffs' capital gain should be determined under the provisions of the federal Internal Revenue Code which is, generally, cost.[5]

We deem it unnecessary to discuss at length the remaining contentions of the plaintiffs since they are substantially similar to those advanced and decided in the *Kellems* case. As we there indicated, a tax on the realization of capital gains does not operate a constitutionally impermissible and

5. Under the provisions of § 1053 of the Internal Revenue Code, if the asset was purchased by the taxpayer prior to March 1, 1913, then his basis, subject to adjustment, is the fair market value of the asset on March 1, 1913. In addition, there are numerous other sections of the Internal Revenue Code which define, adjust or allocate a taxpayer's basis depending on the circumstances surrounding a transaction. See, for example, Internal Revenue Code §§ 301(d), 301(f), 307, 1336, and others.

retroactive manner merely because the amount of the taxable gain is determined by the difference between the proceeds from the sale or exchange and the basis to the taxpayer which, as we have indicated, is usually his cost but may be the fair market value on March 1, 1913, if the asset was owned by him prior to that date. Nor, for the reasons discussed in the *Kellems* case, do we find that the 1969 act unlawfully delegated powers to the tax commissioner or to the Congress of the United States. We note that as in the 1971 act the 1969 act did not expressly provide whether the reference to the Internal Revenue Code of the United States was intended to refer only to the code as it existed at the time of the passage of the 1969 act or was intended to include any amendments to the code which Congress might subsequently enact. It does appear that subsequent to the enactment of the 1969 act Congress did, by §§ 511 to 516 of the Tax Reform Act of 1969 (83 Stat. 635-647), amend the federal tax laws with respect to the taxation of capital gains. These amendments, however, were effective only with respect to taxable years beginning after December 31, 1969, and, as the stipulation of the parties in this case discloses, the transactions which resulted in the realization of capital gains by the plaintiffs all occurred in the 1969 tax year between July 1 and December 31, 1969—all before the effective date of any amendments to the federal income tax law as it existed when the 1969 act was adopted. So far as these plaintiffs and this case are concerned, it is unnecessary to determine the effect of any amendments to the Internal Revenue Code which were made effective subsequent to December 31, 1969.

The Superior Court is advised that question 1 in the reservation is answered "Yes" and question 2, 3, 4, 5 and 7 are answered "No."

No costs will be taxed in this court in favor of any party.

In this opinion the other judges concurred.